IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO.9 OF 2002

Union of India,
Represented by the Chief Engineer,
Chennai Zone, Island Grounds,
Chennai – 09. ..... Appellants.

V e r s u s

Dempo Engineering Services
V.S. Dempo & Co. Pvt. Ltd.,
Campal, Panaji, Goa. ..... Respondents.

Mr. E.P. Badrinarayan, Advocate for the Appellants.

Mr. Sudin Usgaonkar, Advocate for the Respondents.

CORAM: DR. S. RADHAKRISHNAN, J

DATE: 13th October, 2006.

ORDER

1. This appeal has been filed by the Union of India challenging the Judgment and Order dated 20.4.2002 passed by the learned Additional Civil Judge, Senior Division, Panaji whereby the Award passed was made a Rule of the Court so far as claim no.6, 7 and

8 are concerned.

2. As far as claim no.1 is concerned, it was held against the respondent and as far as claim no.6, 7 and 8 are concerned, they were held against the appellants, Union of India.

3. Perused the Award passed by the learned Arbitrator dated 3.5.2001 wherein, while dealing with claim no.6 i.e. payment for work executed in various agreement items, extra items, substituted items, deviated items, escalation/price variation in terms of clause 18 of the contract. The amount claimed was Rs.2,00,470/-. While considering the same the learned Arbitrator has observed with regard to Claim No.6, in paragraphs 27, 28 and 29 of the Award as under :-

> "27. The claimant while arguing this claim withdrew all the items but restricted to payment of final bill which was passed for Rs.2,00,470/-, but Union of India had made recoveries for Income Tax, non return of contract agreement and drawings, and non return of Sch. 'B' stores which were recovered at double the market rate. The Contractor agreed for recoveries for income tax, contract agreement and drgs but stated that recovery for Sch 'B' stores at double the market rate is totally unjustified since the work was in restricted area and he could not have

taken away or misused the stores. Also the cement register shows issued cement fully consumed in the work which was agreed to by UOI. He also pleaded that steel was issued by actual weight but consumption was worked out based on conversion method and hence there can always be some variation.

28. Union of India stated that recoveries at double the market has been made as per contract conditions since the contractor has failed to return the stores issued in excess of the consumption found after technical check of the final bill. Though three different consumptions have been shown in final bill by three authorities, final calculations for recoveries are based on highest authority's calculations. Same has been raised after 3 years of passing of final bill. The contractor has always been stating that any claims arising out of final bill will be raised at appropriate time and also Hon'ble High Court of Bombay has specifically directed to refer all claims to this arbitration. I agree with Contractor.

29. I have gone through the arguments and documents produced by the parties and found that recovery for non-return of over-issued stores is not justified since there has been no misuse on part of the

Contractor & Stores have been fully utilised in the work. The claim is partly sustained and I award s.1,95,981.00 (Rupees one lakh ninety five thousand nine hundred eighty one only) to the contractor against this claim."

4. Claim no.7 is a consequential one with regard to wrongful encashment of bank guarantee amounting to Rs.1,32,194.00 which amount was granted by learned Arbitrator and that the respondent/claimant was liable to refund of the said amount of Rs.1,32,194.00.

5. Mr. Badrinarayan, learned Counsel for the appellants brought to my notice that the Union of India had a total claim of Rs.3,28,175.00 against the respondent/claimant towards the value for unreturned and surplus materials at double the prevailing market rate as decided by Garrison Engineer (GE).

6. Mr. Badrinarayan, fairly stated that the said amount of Rs.1,95,981.00 excess was already paid to the respondent/claimant which they are seeking refund now and the balance is being secured by the Bank Guarantee of the amount Rs.1,32,194.00. To put it in other words, the total amount of Rs.3,28,175.00 (Bank Guarantee amount of Rs. 1,32,194 + Rs. 1,95,981).

7. Perused also the impugned Judgment and Order passed by the learned Civil Judge, Senior Division at Panaji dated 20.4.2002. When the Union of India had moved the learned Civil Judge, Senior Division, Panaji challenging the aforesaid Award, mainly on the ground that the learned Arbitrator could not have granted the aforesaid sum of Rs.3,28,175 on the ground that under clause 10(b) of the General Conditions of contract, the Arbitrator was totally precluded from deciding the same and it was strongly relied on the following portion of the said clause 10(b) which is relevant for our purpose.

> "If on completion of Works the Contractor fails to return surplus materials out of those supplied by Government, the in addition to any other liability which the contractor would incur, the Engineer-in-Charge may, by a written notice to the Contractor, require him to pay within a fortnight of receipt of the notice for such unreturned and surplus materials at double the prevailing market rate as decided by the G.E. If however, the contractor is not satisfied with the decision of the G.E. with regard to market rate, he shall be entitled to represent the matter to CWE within seven days of receipt of G.E.'s decision and

the decision of C.W.E. thereon shall be final and binding."

While dealing with the said objections, the learned Civil Judge, Senior Division rejected the contention of Union of India holding that what was prohibited under clause 10(b) was only with regard to the decision of the market rate, and as such, as regard to the quantum of surplus materials is concerned, there was no finality attached to the decision of either the Garrison Engineer (G.E.) or with regard to the decision of the Commander Works Engineer (C.W.E.)

8. After hearing the learned Counsel Mr. Badrinarayan for the appellants and the learned Counsel Mr. Usgaonkar for the respondents and after perusing the relevant clause 10(b) as quoted above, it is explicitly clear that what was prohibited and finality attached thereto was only fixation of the market rate. The said clause is very clear that once the market rate is fixed by the Garrison Engineer, the decision of the Garrison Engineer will be subject to further representation against the same before the Commander Works Engineer with regard to the issue of fixation of market rate. The learned Arbitrator appears to have relied on material and evidence and has given a conclusive finding in the aforesaid Arbitral Award dated 3.5.2001 wherein in no uncertain terms the learned Arbitrator has stated that, "there has been

no misuse on the part of the contractor and stores have been fully utilised in the work".

9. If that be so, one cannot find fault with the Judgment and Order of the learned Civil Judge, Senior Division holding that the Court cannot go behind the Award with regard to the same. There is no error or illegality in the judgment and order of the learned Civil Judge, Senior Division

10. I also do not find any error apparent on the face of the Award or that the learned Arbitrator had travelled beyond the terms of the contract or that the Arbitrator was totally precluded from deciding whether there was surplus materials left or not. The aforesaid portion of clause 10(b) is explicitly clear that the embargo is only with regard to market rate and not with regard to the quantum of the unreturned surplus material.

11. Under the aforesaid facts and circumstances, there is no merits in the said appeal. Appeal stands dismissed.

DR. S. RADHAKRISHNAN, J.

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